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Hong Leong Bank Bhd (which has taken over all assets and liabilities of Hong Leong Finance Bhd) v Sum-Projects (Bros) Sdn Bhd

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HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO (MT-1) 24–1166 OF 2008
VERNON ONG JC
22 OCTOBER 2009

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Contract — Assignment — Assignment of all rights, title and interest in sale and purchase agreement and property by purchasers to plaintiff bank — Defendant vendor consented to assignment — Plaintiff disposed of property in public auction when defendant defaulted in repayment — Whether defendant's consent was required for plaintiff to be able to assign to bidder — Whether defendant's consent was required for plaintiff to enforce its power of sale under deed of assignment — Whether plaintiff as equitable mortgagee enjoyed priority to proceeds of sale of property ahead of other creditors — Whether defendant could demand payment of outstanding service charges from proceeds of sale of property

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The defendant was the owner of the land and the hotel on it called the Port Dickson Beach Resort. It entered into a sale and purchase agreement ('SPA') to sell a parcel of its land ('the property') for RM281,428 to two purchasers ('the purchasers'). The purchasers obtained a loan of RM225,000 from the plaintiff bank to help finance the purchase of the property. As security for the loan, the purchasers absolutely assigned all their rights, title and interest in the SPA and the property to the plaintiff by way of a deed of assignment. The defendant consented to the assignment unequivocally and without any qualifications. When the purchasers defaulted in the repayment of the loan, the plaintiff disposed of the property in a public auction to a successful bidder ('the bidder'). The sale was to be completed by an assignment of the property from the plaintiff to the bidder. However, when the bidder wrote to the defendant for its consent to the assignment, the defendant refused to deal with the bidder. The plaintiff then intervened and sought the defendant's consent to the assignment but the defendant replied that it would only consent to the assignment if, inter alia, the outstanding service charges amounting to RM34,873.36 were paid to the defendant. The plaintiff then proceeded by way of the instant originating summons for various declaratory reliefs relating to its rights as an assignee of all the rights, title and interest in the SPA and the property under the deed of assignment. The defendant in turn counterclaimed for the service charges which then stood at RM44,417.31. The principal issues to be determined were whether the

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defendant's consent was required for the plaintiff to be able to assign all the rights, title and interest in the SPA and the property to the bidder; whether the defendant's consent was required for the plaintiff to be able to enforce its power of sale under the deed of assignment; and whether the plaintiff as an equitable mortgagee of the property enjoyed priority to the proceeds of sale of the property ahead of other creditors. The plaintiff's claim was predicated on its rights as an assignee under the deed of assignment and as an absolute assignee, the plaintiff submitted that it was vested with certain rights under s 4(3) of the Civil Law Act 1956. Further the plaintiff submitted that it was an equitable mortgagee and that as such it had the right to sell the property when the purchasers defaulted in their repayment. The plaintiff also submitted that as the purchasers' obligations had not been assigned the plaintiff was not liable to pay any service charges owing to the defendant and that the defendant could not demand payment of the outstanding service charges from the proceeds of sale of the property. In response the defendant challenged the plaintiff's competency to bring the action. It argued that since the plaintiff had executed an absolute assignment of its rights to the bidder it lacked the locus standi to institute this action. The defendant also submitted that since the plaintiff could not take the benefit of the SPA without assuming its burden it would have to pay the outstanding service charges.

Held, granting the plaintiff an order in terms and dismissing the defendant's counterclaim with costs:

(1) In this case the defendant had an obligation to complete and deliver the property purchased. In this regard, the right to recover the property from the defendant if withheld was a chose in action and it was this chose in action that was assigned to the plaintiff by way of the deed of assignment. As the legal right to the chose in action now belonged to the plaintiff, it followed that the plaintiff had a right to seek enforcement of the chose in action against the defendant. As an assignee under the deed of assignment the plaintiff had an interest in the subject matter of this action and it had established that its legal interests were affected thereby justifying its seeking relief in this action. In any case the bidder was directed to be joined as a party to the proceedings (see paras 19–20).

(2) Clause 9 of the SPA restricted the rights of the purchasers to assign their rights, title and interest without the defendant's consent, but the defendant expressly consented to the assignment of all rights, title and interest in the SPA and the property to the plaintiff in the letter of consent and undertaking to the deed of assignment. In fact it also consented to the obligations and liabilities under the SPA not being

assigned to the plaintiff and for the purchasers to continue to perform those obligations and liabilities. As such, the defendant's consent was not required for the plaintiff to assign the rights, title and interest in the SPA and the property to the bidder (see paras 21 & 23).

(3) Where a property is without title the disposal of the property is by way of an assignment of the rights, title and interests in the original sale and purchase agreement. In this case the purchasers had absolutely assigned all their rights, title and interest in the SPA and the property to the plaintiff and the plaintiff must adopt the same mechanism, ie an assignment of rights, title and interest in the SPA to a successful bidder. Under such assignment the legal right to the chose in action would be transferred to the successful bidder and it was not necessary for the plaintiff to obtain the defendant's consent to the assignment (see para 27).

(4) It is settled law that in a transaction where the deed of assignment had the intent but not the form of a mortgage, the transaction was an equitable mortgage. As an equitable mortgagee the plaintiff had the right to sell the property when the purchasers defaulted in their loan repayment. It was also a secured creditor and enjoyed priority to the proceeds of sale ahead of other creditors (see paras 29 & 31).

(5) Contractually the obligation to pay the service charges remained with the purchaser. That being the case the defendant was precluded from raising any claims by way of defence of set off against the plaintiff (see para 35).

[Bahasa Malaysia summary

Defendan merupakan pemilik tanah dan hotel di atasnya yang dipanggil Port Dickson Beach Resort. Ia telah menandatangani perjanjian jual beli ('PJB') untuk menjual sebidang daripada tanahnya ('hartanah') untuk RM281,428 kepada dua pembeli ('pembeli tersebut'). Pembeli tersebut telah memperoleh pinjaman sejumlah RM225,000 daripada plaintif untuk membantu pembiayaan belian hartanah itu. Sebagai cagaran untuk pinjaman tersebut, pembeli tersebut telah memberi serahhak mutlak kesemua hak, hak milik dan kepentingan mereka dalam PJB dan hartanah tersebut kepada plaintif melalui surat ikatan penyerahan hak. Defendan dengan jelas telah bersetuju terhadap penyerahan hak itu dan tanpa apa-apa syarat. Apabila pembeli tersebut gagal membuat pembayaran balik pinjaman itu, plaintif telah menjual hartanah tersebut dalam lelongan awam kepada pembida yang berjaya ('pembida'). Jualan itu sepatutnya diselesaikan melalui penyerahan hak hartanah oleh plaintif kepada pembida. Walau bagaimanapun, apabila pembida menulis kepada defendan untuk persetujuannya terhadap penyerahan hak itu, defendan tidak mahu berurusan dengan pembida. Plaintif kemudian telah

campur tangan dan memohon persetujuan defendan terhadap penyerahan hak itu tetapi defendan menjawab bahawa ia hanya akan bersetuju terhadap penyerahan hak itu jika, antara lain, caj perkhidmatan yang belum dijelaskan berjumlah RM34,873.36 dibayar kepadanya. Plaintif kemudian memulakan saman pemula ini untuk pelbagai relief deklarasi berkaitan haknya sebagai pemegang serah hak terhadap semua hak, hak milik dan kepentingan dalam PJB dan hartanah itu di bawah surat ikatan penyerahan hak. Defendan sebaliknya menuntut balas untuk caj perkhidmatan yang pada ketika itu berjumlah RM44,417.31. Isu-isu utama yang perlu ditentukan adalah sama ada persetujuan defendan diperlukan untuk membolehkan plaintif menyerahhakkan semua hak, hak milik dan kepentingan dalam PJB dan hartanah itu kepada pembida; sama ada persetujuan defendan diperlukan untuk membolehkan plaintif menguatkuasakan kuasa jualannya di bawah surat ikatan penyerahanhakkan; dan sama ada plaintif sebagai pemegang gadai janji menikmati hak istimewa terhadap hasil kutipan hartanah mendahului pemiutang lain. Tuntutan plaintif adalah berdasarkan haknya sebagai pemegang serahhak di bawah surat ikatan penyerahan hak dan sebagai pemegang serahhak mutlak, plaintif menghujahkan bahawa ia diberikan hak-hak tertentu di bawah s 4(3) Akta Undang-Undang Sivil 1956. Tambahan pula plaintif menghujahkan bahawa ia adalah pemegang gadai janji berdasarkan ekuiti dan oleh itu ia mempunyai hak untuk menjual hartanah itu apabila pembeli tersebut gagal dalam pembayaran balik mereka. Plaintif juga menghujahkan bahawa memandangkan tanggungjawab pembeli tersebut tidak diserahhakkan, plaintif tidak bertanggungjawab untuk membayar caj perkhidmatan yang belum dijelaskan kepada defendan dan bahawa defendan tidak boleh menuntut pembayaran caj perkhidmatan yang belum dijelaskan itu daripada hasil kutipan jualan hartanah tersebut. Sebagai jawapan defendan mencabar kompetens plaintif untuk memulakan tindakan. Adalah dihujahkan bahawa memandangkan plaintif telah menyempurnakan penyerahan hak mutlak haknya kepada pembida ia tidak mempunyai locus standi untuk memulakan tindakan ini. Defendan juga menghujahkan bahawa memandangkan plaintif tidak boleh mengambil manfaat PJB tanpa mengambil alih tanggungjawab ke atasnya, ia perlu membayar caj perkhidmatan yang belum dijelaskan itu.

Diputuskan, membenarkan perintah seperti dipohon dan menolak tuntutan balas defendan dengan kos:

(1) Dalam kes ini defendan mempunyai tanggungjawab untuk menyelesaikan dan menyerahkan hartanah yang dibeli. Dalam hal ini, hak untuk mendapat balik hartanah itu daripada defendan jika ditahan merupakan pilihan dalam tindakan dan pilihan dalam tindakan ini yang diserahhakkan kepada plaintif melalui surat ikatan penyerahan hak. Memandangkan hak sah untuk membuat pilihan dalam tindakan

kini dimiliki plaintif, maka plaintif mempunyai hak untuk memohon penguatkuasaan pilihan dalam tindakan terhadap defendan. Sebagai pemegang serahhak di bawah surat ikatan penyerahan hak plaintif mempunyai kepentingan dalam perkara pokok tindakan ini dan ia telah membuktikan bahawa kepentingan dari segi undang-undangnya terjejas dan dengan itu menjustifikasikan permohonan reliefnya dalam tindakan ini. Dalam apa jua keadaan pembida diarahkan untuk dinamakan sebagai pihak dalam prosiding tersebut (lihat perenggan 19–20).

(2) Fasal 9 PJB terhad kepada hak-hak pembeli untuk menyerahhak hak-hak, hak milik dan kepentingan mereka tanpa persetujuan defendan, tetapi defendan secara nyata telah bersetuju kepada penyerahan hak kesemua hak-hak, hak milik dan kepentingan dalam PJB dan hartanah kepada plaintif dalam surat persetujuan dan aku janji kepada surat ikatan penyerahan hak. Bahkan ia juga telah bersetuju terhadap tanggungjawab dan liabiliti di bawah PJB yang tidak diserahhak kepada plaintif dan untuk pembeli terus melaksanakan tanggungjawab dan liabiliti tersebut. Oleh itu persetujuan defendan tidak diperlukan untuk plaintif menyerahhak hak-hak, hak milik dan kepentingan dalam PJB dan hartanah itu kepada pembida (lihat perenggan 21 & 23).

(3) Di mana hartanah tiada hak milik maka penjualan hartanah adalah melalui penyerahan hak hak-hak, hak milik dan kepentingan dalam perjanjian jual belia asal. Dalam kes ini pembeli-pembeli secara mutlak telah menyerahhakkan kesemua hak-hak, hak milik dan kepentingan dalam PJB dan hartanah kepada plaintif dan plaintif hendaklah menggunapakai mekanisme yang sama, iaitu penyerahan hak hak-hak, hak milik dan kepentingan dalam PJB kepada pembida yang berjaya. Di bawah penyerahan hak sedemikian hak sah untuk memilih dalam tindakan akan dipindahkan kepada pembida yang berjaya dan plaintif tidak perlu memperoleh persetujuan defendan untuk penyerahan hak tersebut (lihat perenggan 27).

(4) Adalah menjadi undang-undang tetap bahawa dalam transaksi di mana surat ikatan penyerahan hak bertujuan sebagai, tetapi bukan berbentuk gadai janji, transaksi itu merupakan gadai janji ekuiti. Sebagai pemegang gadai janji ekuiti plaintif mempunyai hak untuk menjual hartanah tersebut jika pembeli-pembeli gagal dalam pembayaran balik pinjaman mereka. Ia juga merupakan pemiutang bercagar dan menikmati kelebihan daripada hasil kutipan jualan mendahului pemiutang lain (lihat perenggan 29 & 31).

(5) Secara kontraktual tanggungjawab membayar caj-caj perkhidmatan masih terletak pada plaintif. Oleh yang demikian defendan dihalang daripada menimbulkan apa-apa tuntutan melalui pembelaan tolak selesai terhadap plaintif (lihat perenggan 35).]

Notes

For cases on assignment, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2379–5569.

Cases referred to

Backhouse v Charlton (1878) 8 Ch D 444 (refd)
Carter v Wake (1877) 4 Ch D 605 (refd)
Chuah Eng Khong v Malayan Banking Berhad [1998] 3 MLJ 97; [1999] 2 CLJ 917, FC (refd)
Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd [1988] 2 MLJ 62; [1988] 1 CLJ 164, HC (refd)
Finck v Tranter [1905] 1 KB 427 (refd)
Government of Newfoundland, The v The Newfoundland Railway Company (1888) 13 App Cas 199 (refd)
Hee Awa & Ors v Syed Muhammad Sazalay & Anor [1988] 1 MLJ 300; [1987] 1 LNS 109, SC (refd)
Helsten Securities Ltd v Hertfordshire CC [1978] 3 All ER 262, QB (refd)
Hughes v Pump House Hotel Co Ltd [1900–03] All ER Rep 480, CA (refd)
Karpal Singh v Sultan of Selangor [1988] 1 MLJ 64; [1987] 2 CLJ 342, HC (refd)
Kunstler v Kunstler [1969] 3 All ER 673 (refd)
Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd & Ors [1993] 1 WLR 138, Ch D (refd)
London Passenger Transport Board v Moscrop [1972] 1 All ER 97, HL (refd)
Linden Garden Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 AC 85 (refd)
Majumder v Attorney General Sarawak [1967] 1 MLJ 101, FC (refd)
Malite Sdn Bhd v Abdul Karim bin Gendut & Ors [1981] 2 MLJ 29; [1981] 1 LNS 72, FC (refd)
Mangles & Ors v Dixon & Ors [1843–60] All ER Rep 770, HL (refd)
Meaden v Sealey (1849) 6 Hare 620 (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268, FC (refd)
Pancaram Nilam (M) Sdn Bhd v Malayan Banking Berhad [2000] 4 CLJ 793, CA (refd)
Performing Right Society Ltd v London Theatres of Varieties Ltd [1924] AC 1, CA (refd)
Phileoallied Bank (Malaysia) Bhd v Bupinder Singh a/l Avatar Singh & Anor [2002] 2 MLJ 513; [2002] 2 CLJ 621, FC (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 85, FC (refd)
Thomas v Attorney General [1936] 2 All ER 1325, Ch D

A *Tito v Waddell (No 2)* [1977] Ch 106 (refd)
United General Insurance Co Sdn Bhd v Progress Credit Sdn Bhd [1988] 2 MLJ 297; [1988] 1 LNS 8, SC (refd)
York Union Banking Co v Artley (1879) 11 Ch D 205 (refd)

B **Legislation referred to**
Building and Common Property (Maintenance and Management) Act 2007 ss 23, 32, 33
Civil Law Act 1956 s 4(3)
Law of Property Act 1925 [UK] s 101(1)(i)
C National Land Code s 268
Rules of the High Court 1980 O 15 r 6(2), O 31 r 1, O 83
Strata Titles Act 1985 ss 41A, 55A

Clarence Edwin (Clarence Edwin Law Offices) for the plaintiff.
Gurdit Singh (Sharif & Khoo) for the defendant.

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Vernon Ong JC:

[1] The plaintiff's originating summons is for various declaratory reliefs
E relating to its rights as an assignee of rights title and interest in a sale and purchase agreement and in a parcel of development pursuant to a loan agreement. The defendant's counterclaim is for service charges of RM44,417.31 as at 31 March 2008.

F BRIEF ACCOUNT OF THE FACTS

[2] The defendant is the owner of the land on which the defendant developed a hotel and hotel service suite called Port Dickson Beach Resort. On 28 April 1997 the defendant entered into a sale and purchase agreement
G ('the SPA') with Nor Rizan bin Abu Bakar and Norzaitina bt Baharin ('the purchasers') for the sale and purchase of a parcel ('the property') within the said development for RM281,428. The plaintiff granted to the purchasers a loan of RM225,000 to help finance the purchase of the property under a loan agreement dated 26 July 1997.

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[3] Pursuant to the loan agreement the purchasers executed a deed of assignment dated 26 July 1997 ('the deed of assignment') absolutely assigning to the plaintiff all the purchaser's rights title and interest in the SPA and the property. The purchasers also created a power of attorney favouring the
I plaintiff on even date. *The defendant consented to the deed of assignment.*

[4] When the purchasers failed to repay the loan, the plaintiff recalled and terminated the loan facility. Following the recall and termination, the plaintiff demanded payment of the amount due and owing on the loan facility which stood at RM218,321.84 as at 9 December 2002. When the purchasers failed to comply with the plaintiff's demand the plaintiff terminated the purchasers' licence to occupy the property and disposed of the property by public auction on 16 September 2006 to one Chen Wai Yin ('the successful bidder') for RM47,074. The sale was to be completed by an assignment of the SPA and the property from the plaintiff to the successful bidder. The successful bidder's solicitors wrote to the defendant seeking their consent to the assignment. The defendant refused to deal with the solicitors of the successful bidder. The plaintiff then informed the defendant that the property had been sold to the successful bidder by public auction. In response there to the defendant informed that they would only consent to the assignment to the successful bidder if, among other things, RM34,873.36 being service charges due up to 15 September 2006 or such further sum is paid to the defendant.

ISSUES FOR DETERMINATION

[5] The principal issues that fall to be determined are as follows:

(a) Whether the defendant's consent is required for the plaintiff to assign to the successful bidder all rights title and interest in the SPA and to the property?

(b) Whether the defendant's consent is required before the plaintiff can enforce its power of sale under the deed of assignment? If the defendant's consent is not required, what steps the plaintiff must take to complete the sale in a manner that binds the defendant?

(c) Whether the plaintiff is bound by any liability or obligation arising under the SPA?

(d) Whether the plaintiff is an equitable mortgagee of the property and by reason thereof enjoys priority to the proceeds of sale of the property ahead of other creditors?

THE PLAINTIFF'S SUBMISSION

[6] Learned counsel for the plaintiff submitted that the plaintiff's entire case is grounded on the premise that it is the absolute assignee of all rights title and interest in the SPA and in the property by virtue of section 7.01 of the deed of assignment (*Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 (FC)). As an absolute assignee the plaintiff is conferred the rights stated in s 4(3) of the Civil Law Act 1956. As the SPA does not create any debt payable by the defendant to the purchasers

(assignors), there is no assignment of any debt. Instead the SPA creates a chose in action so that in law the legal right to the chose in action gives the plaintiff the right to enforce the chose against the defendant and compel delivery of title and vacant possession to the property. Alternatively, if the defendant delivered the chose, then the defendant would have to deliver it to the plaintiff since only the plaintiff can give a good discharge for the same to the defendant (*Chung Khiaw Bank Ltd v Hipparion (M) Sdn Bhd* [1988] 2 MLJ 62; [1988] 1 CLJ 164).

[7] On the first issue, it is submitted that the purchaser's right to assign any of their rights duties or obligations under the SPA is restricted under cl 9 so that the prior written consent of the defendant was required and an administrative charge was payable. Clause 9 binds the purchasers as they are the parties to the SPA. The obligation to obtain the defendant's prior written consent casts an obligation on the purchasers and is therefore a right enjoyed by the defendant. As an obligation on the purchaser, it was submitted that the obligation has not passed to the plaintiff under the deed of assignment. Section 7.01 of the deed of assignment clearly ousts the possibility of any obligation being passed to the plaintiff. Since no obligation has been assigned to the plaintiff, the plaintiff is not bound by it and has no obligation to comply with it. Thus, if the plaintiff wishes to assign its rights and interest that was transferred to it, the plaintiff ought to be able to do so without having to first comply with cl 9.

[8] On the second issue, learned counsel submitted that in the absence of any statutory or common law requirement, a lender ought not, to be compelled to seek an order of court to dispose of his security (*Phileoallied Bank (Malaysia) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513; [2002] 2 CLJ 621 (FC)). As to the steps to be taken to complete a sale, it was submitted that the plaintiff need only comply with the requirements of s 4(3) of the Civil Law Act 1956.

[9] On the third issue it was contended that pursuant to section 7.01 of the deed of assignment only the rights and benefits under the SPA were assigned to the plaintiff. The purchaser's burden under the SPA has not been assigned to the plaintiff. As such the purchasers remain liable to perform and observe their obligations under the SPA. Further, an intention to subject an assignee of contractual rights to liabilities under a contract cannot be inferred (*Tito v Waddell (No 2)* [1977] Ch 106). An intention to subject an assignee to the burden of a contract will also be displaced where it is plainly the intention of both parties to the assignment that the assignee is not to be subject to the obligations imposed by the original contract on the assignor (*Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd & Ors* [1993] 1 WLR 138).

[10] On the fourth issue, learned counsel submitted that it is settled law that the plaintiff is an equitable mortgagee in a transaction of this nature (*Chuah Eng Khong v Malayan Banking Berhad* [1998] 3 MLJ 97; [1999] 2 CLJ 917 (FC); *Phileoallied Bank (Malaysia) Bhd v Bupinder Singh Avatar Singh*. As an equitable mortgagee the plaintiff is in a stronger position than an equitable chargee (*Pancaram Nilam (M) Sdn Bhd v Malayan Banking Berhad* [2000] 4 CLJ 793 (CA)). At common law, the remedies available to an equitable mortgagee includes, (i) foreclosure at common law (*York Union Banking Co v Artley* (1879) 11 Ch D 205; *Backhouse v Charlton* (1878) 8 Ch D 444; *Carter v Wake* (1877) 4 Ch D 605); (ii) sale (s 101(1)(i)) of the Law of Property Act 1925; (iii) appointment of receiver (*Meaden v Sealey* (1849) 6 Hare 620); and (iv) entry into possession (*Finck v Tranter* [1905] 1 KB 427). An equitable mortgagee in Malaysia has similar remedies in case where the borrower defaults. The Malaysian courts have recognised the mortgages's right to sell the property when the borrower defaults in repayment. The lender also has a right to enter into possession since the borrower occupies the property merely as a licensee. Under the SPA the purchasers are required to pay to the defendant service charges for the maintenance and management of the common property (see cl 20). As the purchaser's obligation has not been assigned, the plaintiff is not liable to pay any service charges owing to the defendant. It was also submitted that as the defendant does not have a security interest in the property, the defendant cannot demand payment of the outstanding service charges out of the proceeds of sale of the property. As an unsecured creditor the defendant's claim is only a claim in personam against the purchasers. Therefore, the defendant cannot enjoy priority over the plaintiff in respect of the proceeds of sale of the property.

THE DEFENDANT'S SUBMISSION

[11] In response, learned counsel for the defendant challenged the plaintiffs competency to bring this action. It was contended that since the plaintiff has executed an absolute assignment of its rights to the successful bidder, the plaintiff no longer has any vested interest in the chose and cannot, therefore, maintain this action. The proper party to bring this action is the successful bidder. In support of his contention learned counsel cited *Nouvac Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd*; *United General Insurance Co Sdn Bhd v Progress Credit Sdn Bhd* [1988] 2 MLJ 297; [1988] 1 LNS 8; *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd*, *Phileoallied Bank (Malaysia) Bhd v Bupinder Singh*, *Hughes v Pump House Hotel Co Ltd* [1900–03] All ER Rep 480; *Halsbury's Laws of England* (4th Ed) Reissue Vol 6 at p 52).

[12] In the same vein, it was also contended that it is the successful bidder and not the plaintiff who ought to seek these declaratory reliefs. The successful bidder is a party legally affected by the declarations sought in this

action by reason of the sale and assignment of the property and also affected by the defendant's counterclaim (*Majumder v Attorney General Sarawak* [1967] 1 MLJ 101 (FC); *Thomas v Attorney General* [1936] 2 All ER 1325; *London Passenger Transport Board v Moscrop* [1972] 1 All ER 97 (HL); *Kunstler v Kunstler* [1969] 3 All ER 673; *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64; [1987] 2 CLJ 342).

[13] Thirdly, it is contended that as cl 9 of the SPA prohibits an assignment of rights under it the plaintiff and or the successful bidder is legally obliged to obtain the defendant's consent to the sale/assignment of the property. An assignment without the defendant's consent would be ineffective and invalid in the sense that it would not give the assignee any rights against the debtor (*Helsten Securities Ltd v Hertfordshire CC* [1978] 3 All ER 262; *Linden Garden Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85). The necessity and condition precedent to obtaining the defendant's consent is predicated on the need for certain obligations under the SPA to be performed. One of these obligations is the payment of service charges. In this case either the plaintiff or the successful bidder or both of them are responsible for payment of the service charges to the defendant. Further, the contract and the proclamation of sale of the property to the successful bidder provides that (i) the consent of the defendant is required, and (ii) the service charges and all sums due to the defendant shall be paid by the plaintiff or successful bidder from the proceeds of sale.

[14] Fourthly, learned counsel for the defendant contended that the payment of the service charges is not only contractual but also statutory. This is provided under s 41A of the Strata Titles Act 1985. However, as the strata title in respect of the property has not been issued, the obligation to pay is provided under s 23 of the Building and Common Property (Maintenance and Management) Act 2007.

[15] Fifthly, it was submitted that the plaintiff cannot take the benefit of the SPA without assuming its burden. Reference was made to letters from the plaintiff and the successful bidder agreeing to pay the service charges. Further cl 12 in the proclamation of sale confirms that the service charges and outgoings shall be paid from the proceeds of sale (*Tito v Waddell (No 2)*).

[16] Lastly, it was contended that an assignee takes a chose in action subject to all equities which would have been entitled to priority over the rights of the assignee (s 4(3) of the Civil Law Act 1956). In this case the defendant is the debtor; the assignee is the successful bidder; and the assignor is the plaintiff. The chose in action is the SPA. The equity that has accrued is the service charges that are payable and due to the defendant. The plaintiff absolutely assigned all the obligations and liabilities in and under the SPA to

the successful bidder. The obligations and liabilities under the SPA is the payment of the service charges. This is the equity that has priority over the rights of the assignee. It matured at the time of the defendant receiving notice of the deed of assignment (*Mangles & Ors v Dixon & Ors* [1843–60] All ER Rep 770). Further, the plaintiff and the successful bidder is subject to the principle that an assignee is subject to enquiries (*The Government of Newfoundland v The Newfoundland Railway Company* (1888) 13 App Cas 199). Therefore, the defendant (as the debtor) has as against the successful bidder (as the assignee) the same equities (the claim for service charges) and the same rights of setoff and other defences and counterclaims as he would have against the purchaser (the assignor) and or the plaintiff as the date on which notice of the deed of assignment is given to the defendant. The successful bidder cannot be better off than the purchasers and so take the chose assigned to him together with any restrictions attaching to the same.

FINDINGS OF THE COURT

[17] At the outset it is necessary to underscore the following pertinent facts as disclosed from the affidavit evidence:

(i) As security for the repayment of the loan the purchasers absolutely assigned to the plaintiff the full and entire benefit of the SPA together with all their rights, title and interest therein.

(ii) It is expressly stipulated in the deed of assignment and in the loan agreement that the purchasers did not assign their liabilities under the SPA but unequivocally agreed that (a) they would continue to be bound by such conditions, covenants and stipulations, and (b) that the plaintiff would neither have any obligations or liability under the SPA arising from the assignment nor be required or obligated to observe or perform any of the conditions or obligations of the purchasers under the SPA.

(iii) The prohibition against assignment contained in the SPA save with the defendant's consent has been observed and complied by the purchasers when the defendant's express consent to the deed of assignment was expressly given.

(iv) The defendant's consent to the deed of assignment was unequivocal and without any qualifications.

(v) When the purchasers defaulted in repayment the plaintiff disposed the property in public auction to the successful bidder. The sale was to be completed by an assignment from the plaintiff to the successful bidder.

(vi) The solicitors for the successful bidder wrote to the defendant for its consent to the assignment but the defendant refused to deal with them.

(vii) The plaintiff's solicitors then wrote to the defendant seeking the

A defendant's consent to the assignment and undertaking to execute the memorandum of transfer in favour of the successful bidder upon issuance of the strata title.

(viii) In reply the defendant said that it would only consent to the assignment if, inter alia, the outstanding maintenance or service charges is paid,

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(ix) The plaintiff wrote to the defendant asking for a breakdown of the outstanding service charges, the defendant subsequently provided the same,

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(x) The plaintiff did not pay the outstanding service charges and proceeded to execute a deed of assignment in favour of the successful bidder,

(xi) The solicitors for the successful bidder then forwarded a stamped copy of the deed of assignment to the defendant but the defendant refused to acknowledge the assignment on the basis that its consent was required,

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(xii) The plaintiff also forwarded a stamped copy of the deed of assignment to the defendant for its execution,

(xiii) In response the defendant informed the plaintiff that its consent was required and that it was premature to stamp the deed of assignment.

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[18] Before dealing with the principal issues, the court will address the preliminary issue raised by the defendant. It relates to the plaintiff's competency to bring this action and the plaintiff's failure to cite the successful bidder as a party. The plaintiff's claim is predicated on its rights as an assignee under the deed of assignment. The defendant's contention is that the plaintiff lacks locus standi as it has assigned its rights title and interest to the successful bidder. What is the nature of the plaintiff's rights? The plaintiff holds an absolute assignment; this is consistent with section 7.01 of the deed of assignment where the words 'absolutely assigns to the lender' is employed (*Nouvac Mont Dor (M) Sdn Bhd*, *United General Insurance So Sdn Bhd*, *Hipparion (M) Sdn Bhd*, *Phileoallied Bank (Malaysia) Bhd*). As an absolute assignee the plaintiff is vested with certain rights under s 4(3) of the Civil Law Act 1956 which reads:

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> *Any absolute assignment, by writing, under the hand of the assignor*, not purporting to be by way of charge only, *of any* debt or other *legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been effectual in law*, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, *to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor*. (Emphasis added.)

I

[19] As the SPA does not create any debt payable by the defendant to the purchasers, there is no assignment of any debt; accordingly, the defendant is not a debtor within the meaning of s 4(3). Instead, the SPA is a chose in action. A chose in action is defined as 'a thing of which a person who has not the present enjoyment, but merely a right to recover it (if withheld) by action (*Mozley & Whiteley's Law Dictionary* (10th Ed). In this case the defendant has an obligation to complete and deliver the property purchased. In this regard, the right to recover the property from the defendant, if withheld, is a chose in action. It is this right which has been assigned to the plaintiff under the deed of assignment. As the legal right to the chose in action now belongs to the plaintiff it follows that the plaintiff has a right to seek enforcement of the chose in action against the defendant.

[20] As the validity of the assignment is also questioned by the defendant, the plaintiff's only recourse is to seek the court's determination on the validity of the assignment. The plaintiff is in fact seeking to confirm that the chose in action has in fact been transferred to the successful bidder since the defendant has taken the position that its consent is required in order for the chose in action to be assigned. As an assignee under the deed of assignment the plaintiff has an interest in the subject-matter of this action. The court is satisfied that the plaintiff has established that its legal interests are peculiarly affected so as to justify seeking relief in this action (see *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 85; *Hee Awa & Ors v Syed Muhammad Sazalay & Anor* [1988] 1 MLJ 300; [1987] 1 LNS 109). For the foregoing reasons the court finds that the defendant's contention that the plaintiff has no *locus standi* to bring this action is without merit. After hearing of preliminary submission, the court directed that the successful bidder be joined as a party to the proceedings (*Performing Right Society Ltd v London Theatres of Varieties Ltd* [1924] AC 1; *Malite Sdn Bhd v Abdul Karim bin Gendut & Ors* [1981] 2 MLJ 29; [1981] 1 LNS 72 (FC); O 15 r 6(2) of the Rules of the High Court 1980). As the successful bidder was subsequently joined as a party, the defendant's contention on this issue is rendered academic. Turning to the principal issues below.

Whether the defendant's consent is required for the plaintiff to assign to the successful bidder all rights title and interest in the spa and to the property?

[21] The prohibition against assignment in the SPA without the defendant's consent creates a right in favour of the defendant vis a vis an obligation on the part of the purchasers to obtain the defendant's consent. The requirement to obtain the defendant's consent is an obligation under cl 9 of the SPA. The defendant consented to the assignment of the rights title and interest from the purchasers to the plaintiff. Equally pertinent is the fact that the defendant also consented to the obligations and liabilities under the

SPA not being assigned to the plaintiff and for the purchasers to continue to perform those obligations and liabilities. Going by the plain words of the deed of assignment which states that the plaintiff shall have no obligation or liability under the SPA, it follows that the obligation to obtain the defendant's consent was never assigned to the plaintiff. This finding is consonant with the wordings of section 7.01 of the deed of assignment which reads as follows:

> For the consideration aforesaid the Assignor(s) hereby *absolutely assign(s) to the Lender* the Said Property and *the full and entire benefit of the Sale and Purchase Agreement together with all rights, title and interests of the Assignors) therein as security for the Indebtedness* PROVIDED ALWAYS that notwithstanding the Assignment hereinbefore contained or any other provision of the Loan Agreement, the Assignor(s) shall and hereby undertake(s) to continue to observe and be bound by ail whatsoever conditions, covenants and stipulations therein on the part of the Assignor(s) expressed and contained in the Sale and Purchase Agreement, and *the Lender shall have no obligation or liability under the Sale and Purchase Agreement by reason of or arising out of this Assignment, nor shall the Lender be required or obligated in any manner to observe or perform any of the conditions or obligations of the Assignor(s) under or pursuant to the Sale and Purchase Agreement* (except to make progress releases out of the proceeds of the Loan to the Developer/Vendor under the terms and conditions of the Loan Agreement, where applicable) or to present or file any claim, or to take any other action to enforce the terms of the Sale and Purchase Agreement. (Emphasis added.)

[22] Section 7.01 of the deed of assignment clearly rules out the possibility of any obligation being assumed by the plaintiff. The purchasers continue to be responsible and liable for the obligations under the SPA.

[23] Clause 9 of the SPA is an obligation in that it restricts the rights of the purchasers (the original purchasers) to assign their rights title and interest without the defendant's consent. The defendant has expressly confirmed and agreed to its ouster in the letter of consent and undertaking to the deed of assignment. For the foregoing reasons the court takes the view that the defendant's consent is not required for the plaintiff to assign to the successful bidder all rights title and interest in the SPA and to the property. The question is therefore answered in the negative.

Whether the defendant's consent is required before the plaintiff can enforce its power of sale under the deed of assignment? If consent is not required, what steps the plaintiff must take to complete the sale in a manner that binds the defendant?

[24] The deed of assignment was created to secure the repayment of the loan granted to the purchasers. As a form of security which lacks the formality required by law or which relates only to equitable property, the deed of assignment is an equitable mortgage. An equitable mortgage has been defined

as a 'transaction that has the intent but not the form of a mortgage, and that a court of equity will treat as a mortgage (*Black's Law Dictionary* (7th Ed)).

[25] In the absence of any statutory provisions or common law requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, the court should give effect and recognise the contractual rights as determined between the parties. In *Phileoallied Bank (Malaysia) Bhd*, the Federal Court held that in the absence of any statutory provisions or common law requirements requiring the equitable mortgagee to obtain a court order to realise its security under an absolute assignment of rights to land, the courts should give effect to and recognise the contractual rights as determined between the parties. In that case a bank had given a loan to finance the purchase of a property to which no strata title had been issued. The borrowers entered into a loan agreement cum assignment with the bank whereby all their rights, title and interest under the sale and purchase agreement were assigned absolutely to the bank. The borrowers also executed a joint power of attorney in favour of the bank. When the borrowers defaulted in their repayment the bank took steps to auction off the property relying on the loan agreement cum assignment and the power of attorney without obtaining an order for sale from court. The borrowers obtained an injunction from the High Court restraining the bank from proceeding with the sale on the ground that the assignment being absolute, the bank was required to obtain an order for sale under O 31 r 1 of the Rules of the High Court 1980. The High Court held that the assignment was not absolute, thereby creating an equitable charge requiring an order for sale under O 83 of the Rules of the High Court. The bank's appeal to the Court of Appeal was dismissed. On appeal at the Federal Court the principal question was whether a lender may, without obtaining an order for sale from the court, realise his security consisting of immovable property in respect of which there is no issue document of title and no registered charge. The Federal Court answered the question in the negative.

[26] In the present case there is no statutory provision or common law requiring the defendant's consent to realise its security. The plaintiff's right to realise its security is contractual as specifically provided in the loan agreement and under section 7.01 of the deed of assignment. As the plaintiff is not subject to any of the obligations or liabilities in the SPA, the plaintiff is not obliged to obtain the defendant's consent before realising its security. Applying the aforesaid principles to the facts of this case the court holds that the plaintiff (a lender) should not be required to obtain the defendant's consent prior to realising its security.

[27] In order to realise its security in a manner that binds the defendant, it is incumbent upon the plaintiff to comply with the requirements of s 4(3)

of the Civil Law Act 1956. Where a property is without title the disposal of the property is by way of an assignment of the rights, title and interests in the original sale and purchase agreement. In this case the purchasers have absolutely assigned all their rights title and interests in the SPA to the plaintiff. The plaintiff must adopt the same mechanism, ie, by way of assignment of the rights title and interests in the SPA to a successful bidder. Under such assignment the legal right to the chose in action would be transferred to the successful bidder. Accordingly, in an auction sale, two things must be done to create an effective assignment. Firstly, the plaintiff must execute a deed of assignment in favour of the successful bidder. Secondly, notice of the assignment must be given to the defendant. It is not necessary for the plaintiff to obtain the defendant's consent to the assignment. The defendant is bound by the assignment as soon as notice in writing of the assignment is given to the defendant by the plaintiff.

Whether the plaintiff is bound by any liability or obligation arising under the SPA?

[28] As adverted to above, the purchasers remain responsible and liable for the obligations under the SPA. What was assigned to the plaintiff under the deed of assignment is the benefit of the SPA, viz, the rights, titles and interests of the SPA and the property. The purchasers have undertaken to continue to discharge the burdens of it, viz, the conditions, covenants and stipulations of the SPA. The plaintiff, notwithstanding that it is not an original party to the SPA can take the benefits without the burdens of the SPA. This intention is clearly reflected in section 7.01 of the deed of assignment between the purchasers (as assignors) and the plaintiff (as assignee) to which the consent of the defendant is endorsed therein. Further to what was said, it is trite that an intention to infer such liabilities under the contract will not be normally inferred (*Tito v Waddell (No 2)*. The liabilities will, in particular be displaced where it is the assignor who has undertaken (in the contract between the assignor and the assignee) to discharge the burden; where it is plainly the intention of both parties to the assignment that the assignee is not to be subject to the obligations imposed by the original contract on the assignor (see *The Law on Contract* GH Trietel (9th Ed) at p 619). In *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd & Ors*, at pp 146–147 Hoffman J (as he then was) quoted the following passage from the judgment of Megarry VC in *Tito v Waddell (No 2)*:

> If the initial transaction has created benefits and burdens which, on its true construction, are distinct, the question whether a person who is not an original party can take one without the other will prima facie depend on the circumstances in which he comes into the transaction. If, for instance, all that is assigned to him is the benefit of a contract, and the assignor, who is a party to the contract, undertakes to continue to discharge the burdens of it, it would be remarkable if it

were held that the assignee could not take the benefit without assuming the burden. The circumstances show that the assignee was intended to take only the benefit, and that the burden was intended to be borne in the same way as it had been borne previously.

For the foregoing reasons the question is answered in the negative.

Whether the plaintiff is an equitable mortgagee of the property and by reason thereof enjoys priority to the proceeds of sale of property ahead of other creditors?

[29] It is settled law that in a transaction of this nature where the deed of assignment has the intent but not the form of a mortgage, the transaction is an equitable mortgage. In *Chuah Eng Khong v Malayan Banking Berhad* the borrower assigned to the lender all his rights, title and interests in the land as security for a loan pursuant to a loan agreement cum assignment. Subsequently, the borrower defaulted in his repayment installments and the lender instituted legal proceedings for the recovery of the outstanding loan sum. After obtaining summary judgment the lender issued a bankruptcy notice against the borrower. However, before a bankruptcy petition was presented the borrower filed an originating summons claiming, inter alia, for the return of the document of title to the land. The originating summons was dismissed by the High Court and on appeal the Court of Appeal allowed the appeal only to the extent that the bankruptcy notice was set aside. On appeal to the Federal Court the borrower contended that the Court of Appeal was wrong in not ordering the return of the document of title to the borrower. In ruling that the borrower's submission that the loan agreement did not create any interest in land was fallacious Peh Swee Chinn FCJ said at p 926:

Under the said loan agreement, the borrower bought the land in question by borrowing the purchase price from the lender and assigning all the right, title and interest of the borrower in the said loan agreement to the lender. The borrower agreed to execute a charge over the said land once the document of title relating thereto was obtained or issued, the said land being a part of a large piece of land which was under the process of subdivision into various smaller lots for which sub-divisional documents of titles would be issued later. Transactions of the above nature, which were modelled substantially from agreements which purchasers of houses would make with building societies in the United Kingdom, have been in practice in this country for many years.

At common law and under the relevant rules of equity, the said loan agreement would amount to an equitable mortgage because the assignment of the right, title and interest in the said land was expressly or obviously for the purpose of securing the loan given to the borrower to purchase the said land. The said loan agreement is not an out-and-out purchase of the said land. This view is reinforced by the promise that when the document of title of the said land was available after the completion of the subdivision aforesaid, the borrower would execute a charge in favour of the lender according to the provisions of the National Land Code (hereinafter called 'the Code'). It is true that nowhere in the said loan agreement

A has the word 'mortgage' been used, but it is a security transaction in connection with the loan given by the lender with a provision for repayment after which, the borrower 'shall be entitled to obtain a discharge and release of the said lot from the lender', (see cl 27 of the said loan agreement). Thus we have the loan, the contractual right to repay or to redeem the said land and the assignment of all 'right title and interest' in the said land pending the exercise of such contractual B right to redeem. The said loan agreement therefore at common law, will be a mortgage. It would be an equitable mortgage (and not a legal mortgage) because the borrower at the time of signing the said loan agreement had no legal estate (or registered proprietorship of a grant of land etc) but only an equitable interest as an purchaser by contract from a housing developer, pending the issuance of a separate C document of title aforesaid. In other words, it is a mortgage in equity for which the actual form of words is immaterial provided the meaning is plain when interpreting a document as a mortgage or equitable mortgage, see *William Brandt's Sons and Co v Dunlop Rubber Co Ltd* [1905] AC 454 at p 462.

D If it is an equitable mortgage, like a legal mortgage, the borrower has obtained a second right to redeem after the contractual date for redemption has expired, ie, he has got the equity of redemption for, in the eyes of equity, the lender is not the owner of the said land notwithstanding the assignment, but the borrower is, but subject to the mortgage, and the lender is a mere 'incumbrancer'. The equity of redemption arises as soon as any document on a true construction, is found to be E a mortgage. The use of the word 'mortgage' may sound like sacrilege in view of the presence of the code which does not use the word, especially to a legal man who specialises in 'common law' but not to one who is familiar with 'chancery practice'; for to the latter, despite the assignment, the borrower is still the owner of the said subject to the mortgage. The matter, of course, should not rest here. Further investigation into the legal position of a mortgage in this country is required. F (Emphasis added.)

[30] The fact that transactions of this nature create an equitable mortgage was reaffirmed by the Federal Court in *Phileoallied Bank (Malaysia) Bhd*. An G absolute assignment is in a stronger position than a charge. As an equitable mortgagee the plaintiff is entitled to deal with the SPA and the property in any manner so long as notice of default and notice to remedy has been given the purchasers cum assignor. This issue was discussed in the Court of Appeal in *Pancaram Nilam (M) Sdn Bhd v Malayan Banking Berhad* [2000] 4 CLJ H 793 where Mokthar Sidin JCA after making reference to the Supreme Court in *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd*, said at p 807:

In our view the Supreme Court made it very clear that when there is an absolute assignment there is no necessity for the court to determine whether an assignment I is an equitable charge or not. The determination of the assignment to be an equitable charge is for the purpose of bringing that assignment to be a charge within the meaning of s 4(3) of the Civil Law Act 1956. Where the assignment is an absolute one the assignee should have all the rights, title and interests of the assignor in the sale and purchase agreement. In other words the rights, title and interest of assignor in respect of property under the sale and purchase agreement

is transferred to the assignee. As such the assignee can do anything to tire (sic) property once notice of default and notice to remedy has been given to the assignor. The Supreme Court made it clear that 'a document given by way of charge' is not one which absolutely transfers the property'. As such an absolute assignment is in a stronger position than a charge.

[31] The right of an equitable mortgagee to sell the property when the borrower defaults in repayment has been recognised by the Malaysian courts (*Phileoallied Bank (Malaysia) Bhd v Bupinder Singh a/l Avatar & Anor*. In practice the power of sale at common law and under contract is exercised when the lender assigns its rights title and interest in the sale and purchase agreement to a successful bidder at an auction. In this scenario does the plaintiff enjoy priority to the proceeds of sale of the property over other creditors? On this issue it is pertinent to note that the obligation to pay the service charges lies on the purchasers as provided under cl 20 of the SPA. This obligation remained with the purchasers notwithstanding the deed of assignment as only the rights title and interests in the SPA were assigned to the plaintiff. As the purchasers remain liable to pay the service charges the defendant ought to recover the arrears in service charges from the purchasers. As an equitable mortgagee the plaintiff is a secured creditor. By analogy, under the National Land Code, a registered charge is entitled to the proceeds of sale of a charged property. Only two types of payments take priority over the chargee's claim. They are (1) payment of rent to the state authority or the lessor (in a charge of a lease) and (2) payment of expenses incurred in connection with the sale of the charged property (see s 268 of the National Land Code). As the defendant is only an unsecured creditor the defendant has no right to make any prior claim to the proceeds of sale of the property. Accordingly, the plaintiff qua equitable charge enjoys priority to the proceeds of sale ahead of other creditors.

ISSUES RAISED BY THE DEFENDANT

Payment of service charges under the Strata Titles Act 1985 and the Building and Common Property (Maintenance and Management) Act 2007

[32] It was submitted that under the Strata Titles Act 1985 the proprietor of the property is liable to pay contributions to the management corporation in default whereof the proprietor is guilty of an offence under s 55A of the Strata Titles 1985 Act. However, as the property in question is without strata title, the defendant's reliance on the 1985 Act is not relevant. The Building and Common Property (Maintenance and Management) Act 2007 which applies in cases where strata title has not yet been issued, provides that the purchaser shall pay the maintenance and the management charges; and that failure to pay constitutes an offence under the act. The defendant's

contention points to the purchasers who should pay the service charges. Going by the deed of assignment and the assignment of the rights title and interests of the SPA and the property, it cannot be said that the word 'purchaser' in the 2007 Act means and includes the plaintiff. More importantly, the 2007 Act only came into force after the transactions in question have been entered into. As such, the contractual rights vested in the plaintiff and the successful bidder cannot be altered by the 2007 Act; especially since the 2007 Act is not expressly stated to be retrospective. Further under the 2007 Act if the purchaser fails to comply with a demand notice the joint management body may institute legal proceedings in court for the recovery of the charges (see s 32) alternatively, the commissioner may on the request of the joint management body issue a warrant of attachment for the movable property of the purchaser within the property (s 33). The 2007 Act only allows the sequestration of the purchaser's movable property within the property; there is no right to sequester the property itself. If the property itself is to be attached, the joint management body will have to obtain a civil judgment followed by a writ of execution and prohibitory order under the Rules of the High Court 1980. Even then, this mode of execution is subject to any existing charges or interest in the property. In other words, the debt does not take priority over existing charges or registered interest in the property. Thus, neither the 1985 Act nor the 2007 Act support the defendant's contention that the plaintiff or a person taking an assignment from it would be liable to pay charges incurred by the purchasers.

An assignee take subject to equities

[33] It was also submitted that the outstanding service charges is an equity that takes priority to the right of the plaintiff (under the deed of assignment) or the successful bidder (under the second assignment). The debtor is not a party to the transaction. The legal position on this point is stated in *Cheshire, Fifoot and Furmston's Law of Contract* (15th Ed) as:

> An assignee, whether statutory or not, takes subject to all equities that have matured at the time of notice to the debtor. This means that the debtor may plead against the assignee all defences that he could have pleaded against the assignor at the time when he received notice of the assignment.

[34] What is an assignment? Simply put it is a process where the benefit of a contract has been transferred to a third party. This is a transaction between the person entitled to the benefit of the contract (the assignor) and the third party (the assignee) as a result of which the assignee becomes entitled to sue the person liable under the contract (the debtor). When an assignee takes subject to equities he takes subject to any defects in the assignor's title and subject to claims which the debtor has against the assignor. If the debtor has claims arising out of the contract assigned, on which he could have relied by

way of defence or set off against the assignor, he can also rely on those claims against the assignee, and he can do so whether the claims have arisen before or after notice of the assignment is given to him. *The Law of Contract*, Trietel (12th Ed) pp 732–733.

[35] Contractually the obligation to pay the service charges remained with the purchaser. That being the case the defendant is precluded from raising any claims by way of defence of set off against the plaintiff. The defendant's claim for the same may only be directed against the purchasers; the defendant's right to sue the purchasers subsist. Further, merely because the plaintiff through its then solicitors had enquired of the defendant concerning the outstanding service charges owed by the purchasers does not alter the legal position; such enquiry does not create any equity where none existed in law before. *Mangles & Ors v Dixon & Ors* and the government of Newfoundland cited by the defendant are distinguishable. In those cases the defences were available to a debtor at the time notice of an assignment was given and which the debtor could thus legitimately set up against the assignee.

[36] To summarise, the court takes the view that:

(1) The defendant's consent is not required for the plaintiff to assign to the successful bidder all the rights, title and interests in the SPA and the property;

(2) The defendant's consent is not required before the plaintiff can enforce its power of sale under the deed of assignment;

(3) The plaintiff is not bound by any liability or obligations arising under the SPA; and

(4) The plaintiff is an equitable mortgagee of the property and enjoys priority to the proceeds of sale of the property ahead of other creditors.

[37] For the foregoing reasons the court grants an order in terms of the plaintiff's application in encl 2. The defendant's counterclaim is dismissed with costs.

Order in terms granted and the defendant's counterclaim dismissed with costs.

Reported by Kohila Nesan